RECORD AND BRIEFS

Supreme Court U.S.
FILED
SEP 14 2017
OFFICE OF THE CLERK

No. 16-1435

In the
Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, et al.,
Petitioners,

v.

JOE MANSKY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

ERICK G. KAARDAL
Mohrman, Kaardal & Erickson
150 South Fifth Street
Suite 3100
Minneapolis, MN 55402
Telephone: (612) 465-0927
E-mail: kaardal@mklaw.com

WENCONG FA*
**Counsel of Record*
DEBORAH J. LA FETRA
OLIVER J. DUNFORD
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
E-mail: wf@pacificlegal.org

Counsel for Petitioners

Table of Contents

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS..... 1

I. THE STATE CASTS NO DOUBT ON THE DEEP TENSION AMONG THE LOWER COURTS OVER THE QUESTION PRESENTED..... 1

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT 5

III. THE STATE'S VEHICLE CONCERNS ARE MISGUIDED AND THE STATE CONCEDES THAT THE ISSUE PRESENTED IS IMPORTANT..... 8

CONCLUSION..... 11

Table of Authorities

Cases

Bd. of Airport Comm'rs of the City of Los Angeles v. Jews for Jesus, Inc.,
482 U.S. 569 (1987) 1-2, 5

Burson v. Freeman,
504 U.S. 191 (1992) 5, 7

Elrod v. Burns,
427 U.S. 347 (1976) 2

Farrell v. Burke,
449 F.3d 470 (2d Cir. 2006) 8

Int'l Soc'y for Krishna Consciousness, Inc. v. Lee,
505 U.S. 672 (1992) 3, 5

Members of City Council of City of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984) 10

Mount Soledad Mem'l Ass'n v. Trunk,
567 U.S. 944, 132 S. Ct. 2535 (2012) 10

North Carolina Right to Life, Inc. v. Bartlett,
168 F.3d 705 (4th Cir. 1999) 2

Picray v. Secretary of State,
140 Or. App. 592 (1996), *aff'd by an equally divided court*, 325 Or. 279 (1997) 3

Reed v. Purcell,
No. CV 10-2324-PHX-JAT,
2010 WL 4394289 (D. Ariz. Nov. 1, 2010) 3-4, 7

United Food & Commercial Workers Local 1099 v. City of Sidney, 364 F.3d 738 (6th Cir. 2004) 2

United States v. Stevens, 559 U.S. 460 (2010) 4, 8-9

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) 9

Wisconsin Right to Life, Inc. v. Barland, 751 F.3d 804 (7th Cir. 2014) 2

Statute

Minn. Stat. § 204.035, subd. 1 9

Minn. Stat. § 211B.11 ..... 1, 6, 10

Other Authorities

Fallon, Richard H., Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853 (1991) 4

Leonhardt, David, *How Red States Turn Blue (and Vice Versa)*, New York Times, Oct. 13, 2016, https://www.nytimes.com/2016/10/13/opinion/campaign-stops/how-red-states-turn-blue-and-vice versa.html?mcubz=0 4

REPLY BRIEF FOR PETITIONERS

Minnesota Statute Section 211B.11 bans political apparel in polling places across the state. Although the State[1] acknowledges the obvious "First Amendment interests [] involved," Brief In Opposition (BIO) 12, it insists that it can create speech-free zones without running afoul of the Free Speech Clause. BIO 38. This Court should settle the debate. First, the State did nothing to cast doubt on the significant tension among the lower courts over the question presented. The State attributes much to certain distinctions, but none of those distinctions make a difference here. Second, the State's efforts to reconcile the disagreement between the court below and decisions of this Court are unpersuasive. This Court has never countenanced speech-free zones at polling places. Rather, it has held that bans on First Amendment activity are unconstitutional, regardless of the forum. *Bd. of Airport Comm'rs of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 573–74 (1987). Finally, the State misunderstands this Court's overbreadth jurisprudence. The record in this case makes it a particularly good vehicle for review on an issue that both sides agree is one of nationwide importance.

I

THE STATE CASTS NO DOUBT ON THE DEEP TENSION AMONG THE LOWER COURTS OVER THE QUESTION PRESENTED

The Petition in this case presents the important, widespread, and recurring question of

---

[1] For purposes of this reply, "the State" refers to all respondents.

whether the government may ban all political speech. Pet. 10–18. There is significant tension among the circuit courts over whether a blanket ban on political speech can ever be reconciled with the First Amendment. The State wholeheartedly embraces the decisions in its favor—adding even another to its lot. BIO 22 (citing *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 748 (6th Cir. 2004)).[2] Yet it attempts to soften the tension with its gloss on cases falling on the other side of the ledger. BIO 30.

First, the State claims that unlike the unconstitutionally overbroad laws in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) and *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014), Minnesota's Political Apparel Ban applies equally to all speakers. BIO 30. But that was also true in *Bartlett*, which involved a ban on corporate expenditures for "political purpose[s]"—conservative or liberal. *Bartlett*, 168 F.3d at 713. And that was true in *Barland*, which involved a law concerning committees that are formed to influence elections—in favor of Republicans or Democrats. *See Barland*, 751 F.3d at 833.

The State also attributes significance to the fact that *Bartlett* and *Barland* "do not apply the forum analysis that applies to the polling place." BIO 30. But there is none. Speech-free zones violate the Free Speech Clause, regardless of forum. *See Jews for*

---

[2] Although that case involved solicitation rather than political apparel, Petitioners agree with the State's hint that further percolation is unwarranted. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Jesus, 482 U.S. at 573–74 (invalidating speech-free zone in airport). Although the State cites lower court decisions for its (ultimately irrelevant) statement that polling places are nonpublic forums, BIO 1, it eventually acknowledges, that even in "nonpublic forum[s], no government interest could justify excluding all forms of protected speech." BIO 34; *see also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (holding that airports are nonpublic forums where First Amendment protections nonetheless exist).

The State's efforts to distinguish decisions from the Oregon Court of Appeals and the United States District Court for the District of Arizona are similarly unpersuasive. The Oregon Court of Appeals, in *Picray v. Secretary of State*, 140 Or. App. 592 (1996), *aff'd by an equally divided court*, 325 Or. 279 (1997), invalidated an Oregon law that was virtually identical to the Political Apparel Ban. Pet. 16–18. It makes no difference that the decision was grounded in the Free Expression Clause of the Oregon Constitution, because the Oregon court analyzed the question in a way that would have been wholly appropriate if the case had been brought under the First Amendment. The State points to no decision that says otherwise. BIO 31.

The State claims that viewpoint neutrality distinguishes this case from *Reed v. Purcell*, No. CV 10-2324-PHX-JAT, 2010 WL 4394289 (D. Ariz. Nov. 1, 2010). BIO 32. Not so. In addition to viewpoint discrimination, the *Reed* court noted the problems with "misuse of discretion." *Id.* at *4. Overbroad bans on speech invite that misuse by creating an "excessively capacious cloak of administrative or

prosecutorial discretion, under which discriminatory enforcement may be hidden." Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 884 (1991). Thus, one of the dangers with the State's open attempt to create a "controlled environment" is the fact that someone must be exercising the levers of control. BIO 4.

The State is wrong when it claims that *Reed* has nothing to do with the overbreadth doctrine. BIO 32. Although the *Reed* court did not explicitly invoke the overbreadth doctrine, it plainly conducted overbreadth analysis. For example, the court observed that the law may cause voters to forgo wearing red or blue t-shirts at the polls. *Reed*, 2010 WL 4394289, at *1. The State derides this observation as "absurd," but that does not make it so. BIO 14, 26. If a *New York Times* article could serve as a basis for a ban on Tea Party apparel, as the court below said it could, App. B-25 to B-26, then there is no reason why the same sort of evidence could not be used to ban red or blue shirts. *Cf.* David Leonhardt, *How Red States Turn Blue (and Vice Versa)*, New York Times, Oct. 13, 2016.[3] (using red to denote states that voted Republican and blue to denote states that voted Democrat). Perhaps the State seeks to assure the Court that the "mercy of a prosecutor" will stand between Minnesota voters wearing colored shirts and criminal and civil penalties. *United States v. Stevens*, 559 U.S. 460, 477 (2010). But this Court will "not uphold an unconstitutional statute merely because the Government promise[s] to use it responsibly." *Id.* at 480.

---

[3] https://www.nytimes.com/2016/10/13/opinion/campaign-stops/how-red-states-turn-blue-and-vice-versa.html?mcubz=0.

II

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

The State's Brief in Opposition contains rote recitations of favorable language from this Court's overbreadth decisions. BIO 12–13. Yet a careful application of those decisions to the facts here reveals that the Political Apparel Ban violates the overbreadth doctrine. First, the State's insistence on forum analysis (BIO 15) does not square with this Court's decision in *Jews for Jesus*, which invalidated a speech-free zone on overbreadth grounds without conducting forum analysis. *See Jews for Jesus*, 482 U.S. at 573–74. As noted above (at 3), this Court later determined that an airport is a nonpublic forum. *See Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 679. Thus, if a ban on speech can violate the overbreadth doctrine in the nonpublic forum of an airport, it can violate the overbreadth doctrine in the nonpublic forum of a polling place.

Second, the State errs when it says that any overbreadth in the law here is not substantial. BIO 7, 27. As the undisputed record makes plain, the Political Apparel Ban sweeps much more broadly than the law at issue in *Burson v. Freeman*, 504 U.S. 191 (1992). The State concedes that Minnesota prohibits not just shirts that say "vote for Hilary" or "vote for Trump," but also shirts, caps, and buttons that say "Don't tread on me," "Liberty," "We'll remember in November," and "Fiscal Responsibility, Limited Government, Free Markets." BIO 3. The State's position here is entirely consistent with its earlier statements that it would enforce its ban not just against apparel with a Tea Party logo, but also against

apparel of MoveOn.Org, the Chamber of Commerce, and the AFL-CIO. Pet. 24. Judge Shepherd further noted in his separate opinion that the ban applies to shirts that say "American Legion," "Veterans of Foreign Wars," "NRA," "NAACP," or that bear the logo of any of those organizations. App. D-18. Those examples show substantial overbreadth.

Confronted with these examples, the State claims that there is "no evidence of unreasonable applications." BIO 21. But that is only because the State did not make its expansive view of Section 211B.11 known until the eve of Election Day 2010, BIO 3, and because it has prevailed in the lower courts for the last seven years. Only this Court can have the final word on whether the statute is facially overbroad based on the likely potential applications. For now, it is notable that the State does not even attempt to distinguish Petitioners' example of unreasonable speech restrictions. Pet. 31. The State offers only boilerplate that it is afforded "significant latitude" and that a speech restriction "need not be the most reasonable" limitation. BIO 20. Tellingly, although speech restrictions in a nonpublic forum must be both viewpoint neutral *and* reasonable, BIO 20, the State does not provide the Court with a single example of an *unreasonable* restriction at the polling place.

That is no accident. Although the State occasionally argues that its ban does not "prohibit all protected expression," only "certain political material," BIO 34, it later reveals that the statute creates a zone in which the only permitted expressive activity is voting. BIO 38. After all, anything less than a complete speech ban might interfere with voters' ability to "calmly and efficiently cast ballots." BIO 23.

That is not to say that a ban on *political* expression would fare any better in this Court. "[T]he First Amendment has its fullest and most urgent application to" political speech. *Burson*, 504 U.S. at 196. It makes little sense to allow the government to evade overbreadth analysis when it takes away core First Amendment rights only because it has left the periphery of those rights intact.

The State is also incorrect when it says that the ban is a "logical and straightforward application of *Burson*." BIO 1. *Burson* upheld a restriction on campaign-related paraphernalia at the polling place in light of the government's interests in preventing voter intimidation and election fraud. *Burson*, 504 U.S. at 206. Neither interest is implicated by a law that bans speech concerning issues not on the ballot or simply referencing—via a logo—the existence of a group that engages in advocacy. And although the restriction in *Burson* might have protected the right to vote, *id.* at 211, the sheer breadth of the Political Apparel Ban chills the exercise of that right. It is easy enough to avoid wearing a shirt that campaigns for candidates or endorses ballot issues. But political messages "can be found everywhere if one looks hard enough." *Reed*, 2010 WL 4394289, at *4. It is no stretch to think that some voters may be chilled from going to the polling place if doing so could subject them to criminal and civil penalties at an election judge's whim.

III

THE STATE'S VEHICLE CONCERNS ARE MISGUIDED AND THE STATE CONCEDES THAT THE ISSUE PRESENTED IS IMPORTANT

The State suggests that, because the Eighth Circuit held that the Political Apparel Ban was constitutionally applied to Petitioners' apparel, this Court should not review Petitioners' facial overbreadth challenge. BIO 14.

The State is incorrect because Petitioners' facial claim is distinct from the previously decided as-applied claim. Under the First Amendment, a speech restriction is facially overbroad if a substantial number of its applications are unconstitutional, judged in relation to the law's plainly legitimate sweep. *Stevens*, 559 U.S. at 473. Contrary to the State's assertion, BIO 12, Petitioners did not abandon anything by seeking certiorari on their facial, rather than as-applied, claim. After all, "an overbreadth challenge inquires into the constitutionality of [a] regulation as applied to hypothetical third parties, without regard to its constitutionality as applied to the plaintiff." *Farrell v. Burke*, 449 F.3d 470, 483 (2d Cir. 2006) (Sotomayor, J.). Here, that means this Court gets the last word on whether Minnesota may ban Tea Party apparel that invoke classic American phrases such as "Liberty" and "Don't tread on me" at the polling place. The difference in an overbreadth claim is that the Court is not confined to the facts in this case, but may also consider whether Minnesota's statute effectively bans a host of other political apparel in the polling place, such as those that feature

the logos of the Chamber of Commerce, the AFL-CIO, and so on.

In fact, the record in this case makes it a particularly good vehicle for review. Claims of facial invalidity often rest on speculation. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Factual disagreements on whether a particular statute is likely to be applied to particular conduct can complicate an overbreadth case. *See Stevens*, 559 U.S. at 473. Here, however, the parties largely agree on the scope of apparel encompassed by the Political Apparel Ban. Minnesota has consistently held the view that it may ban the Tea Party apparel and "Please I.D. Me" buttons here.[4] The State has never retreated from its concession at oral argument that the ban also reaches apparel of the Chamber of Commerce and the AFL-CIO. Pet. 7. Although the State derides some applications (red and blue shirts) as absurd, it has never challenged Judge Shepherd's conclusion that the statute applies to even more

---

[4] Petitioners take exception to the State's accusation that the "Please I.D. Me" buttons were "part of an orchestrated effort to disrupt the polling place by asking voters to produce a Minnesota I.D." BIO 2, 9. The Eighth Circuit found that this assertion must have been based on "argument and evidence from some source outside the four corners of the complaint." App. D-12 (citation omitted). At the summary judgment stage, the district court found only that the buttons *could* cause confusion, not that they caused confusion. App. E-16. In any event, as the district court noted, another provision of Minnesota law already prevents voters from "deceiving another individual regarding . . . qualifications of voter eligibility." App. E-17 (citing Minn. Stat. § 204.035, subd. 1 (2010)). What is more, because the Political Apparel Ban encompasses all sorts of apparel, the law is overbroad whether or not it could be constitutionally applied to just a single type of button.

apparel—those featuring the logo of the NAACP, the NRA, and others. Pet. 8.[5] The State urges those other organizations to correct the law's infirmities "in future as-applied challenges." BIO 2. But the whole point of the overbreadth doctrine is to prevent a statute "from inhibiting the speech of third parties who are not before the Court." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

The State also argues that review is unwarranted because an overbreadth claim should be used only as a last resort. BIO 12. As the State acknowledges elsewhere, Petitioners already tried other options, including an as-applied claim. Only now, for the first time since Petitioners filed their complaint seven years ago, does the interlocutory posture of the case no longer present a barrier to this Court's review. *See Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 132 S. Ct 2535, 2536 (2012) (Alito, J., concurring in the denial of certiorari).

This case presents an excellent vehicle for this Court to review a question of nationwide importance. The State concedes that Minnesota's Political Apparel Ban operates "like similar prohibitions in other states." BIO 23. And the State acknowledges that "[s]tatutes limiting political activity in and around polling places like Section 211B.11 have been in effect

---

[5] There are minor disagreements about whether red and blue shirts could be encompassed under the Political Apparel Ban. BIO 14, 26. That debate does not make a material difference in this case. Regardless of whether Minnesota has the statutory authority to ban colored shirts, the Political Apparel Ban is overbroad.

in every state for many years." BIO 16. Under the State's rationale, such statutes are permissible as long as they are reasonable and viewpoint-neutral—and the State has never acknowledged the possibility of an unreasonable application of a speech ban, even when challenged by the Circuit Court judges at oral argument. Pet. 7 (citing oral argument). The decision below, if allowed to stand, invites states to enact speech-free zones at polling places around the Nation. Only this Court can prevent that untoward result.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: September 2017.

Respectfully submitted,

ERICK G. KAARDAL
Mohrman, Kaardal & Erickson
150 South Fifth Street
Suite 3100
Minneapolis, MN 55402
Telephone: (612) 465-0927
E-mail: kaardal@mklaw.com

WENCONG FA*
*Counsel of Record
DEBORAH J. LA FETRA
OLIVER J. DUNFORD
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
E-mail: wf@pacificlegal.org

Counsel for Petitioners